

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001634-MR

MARY LOUISE THOMAS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN MINTON, JR., JUDGE
ACTION NO. 97-CR-00517

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Mary Louise Thomas (Thomas) appeals an order of the Warren Circuit Court entered June 25, 1999, which revoked her probation and reinstated her five-year sentence for trafficking in marijuana within 1000 yards of a school (KRS 218A.1411). On appeal, Thomas contends that the legislature's classification of cannabis sativa (marijuana) as a scheduled I controlled substance is both arbitrary and unreasonable and thus unconstitutional and further, that the defense of "medical necessity" should be available to her. Having thoroughly

reviewed appellant's arguments and finding them to be lacking in legal merit, we affirm.

Thomas was indicted by the Warren County Grand Jury on three counts of trafficking in a controlled substance (marijuana) within 1000 yards of a school. She was subsequently appointed counsel and a competency evaluation ordered. Thomas was determined to be competent to stand trial. Eventually Thomas was represented by private counsel and entered into a negotiated plea agreement. Pursuant to the plea agreement, Thomas would enter a guilty plea to one count of trafficking in marijuana within 1000 yards of a school and the Commonwealth would dismiss the remaining two counts and recommend a probated sentence of five years. On October 28, 1998, the court accepted the negotiated plea agreement. After a pre-sentence investigation report was filed with the court, final sentence was imposed on November 24, 1998.

At the sentencing hearing, Thomas's attorney argued that she should be excused from the probation condition requiring her to be drug tested because she used marijuana to alleviate chronic pain she suffered due to several medical conditions. After a discussion regarding the drug testing condition, the trial court indicated that drug testing would be a condition of probation and included it in his written order. Specifically, the trial court wrote on his order of probation:

Waiver of 4th and 5th Amendment Rights; random drug or alcohol screens. Not possess or consume drugs or alcohol during this period of probation.

On May 12, 1999, the Commonwealth filed a motion to revoke appellant's probation based upon her use of marijuana. At the hearing to revoke Thomas's probation, Officer Charles Fishback, appellant's probation officer, testified that a drug screen of Thomas administered March 1, 1999, came back positive for drug usage. Appellant testified at the hearing and readily admitted she regularly used marijuana for medicinal purposes. Appellant did not deny she violated her probation conditions but rather argued, as she does before this Court, that Kentucky's statutes making private use of marijuana illegal are unconstitutional and that the courts should provide Thomas and other similarly ill persons a "medical necessity" defense to the criminal offense of possession of marijuana. After giving Thomas several opportunities to fully argue and brief the issues, and to supplement the record with medical documentation of her physical ailments and the medicinal benefits of marijuana, the trial court granted the Commonwealth's motion and revoked Thomas's probation. This appeal followed.

Probation and revocation therein is governed by KRS Chapter 533. Specifically, conditions of probation which may be imposed are set forth in KRS 533.030, which states, in relevant part:

(1) If the defendant's record indicates a controlled substance or alcohol problem, submit to periodic testing for use of controlled substances or alcohol and pay a reasonable fee, not to exceed the actual cost of the test and analysis, as determined by the court, said fee to be collected by the circuit clerk, held in an agency account, and disbursed, on court order, solely to the agency or agencies responsible for testing

and analysis as compensation for the cost of the testing and analysis performed under this subsection. For good cause shown, the testing fee may be waived by the court.

In Sutherland v. Commonwealth, Ky., 901 S.W.2d 235 (1995), the Kentucky Supreme Court set forth how and when a sentence of probation may be revoked:

It must be pointed out that KRS 533.020(1) provides that a probated sentence may be revoked "at any time" prior to the expiration or termination of the period of probation.

Further, KRS 533.050(1)(a) provides that a trial court may summon a probationer to appear before it "at any time" before the termination of a sentence of probation, upon a finding of probable cause to believe that there was a violation of a condition of probation. The court has the authority to revoke probation, after conducting a hearing. KRS 533.050(2).

Sutherland, 910 S.W.2d 236-237. In this appeal, appellant does not contest the court's authority to impose the condition of drug testing, nor that a proper hearing was conducted, nor that probable cause existed for the Commonwealth to file the motion, nor that she was still under probation. Rather, appellant argues that the condition imposed by the trial court (drug testing), which she was made specifically aware of at the time of sentencing, is now unconstitutional and improper. We believe her arguments to be both untimely and unfounded. Thomas made her opposition to the drug testing condition known to the trial court. However, the trial court, based upon the facts of the case and statutory authority, imposed drug testing as a condition of her probation. Had Thomas wished to contest its imposition

she should have appealed at that time to properly preserve the issue.

Despite her failure to do so, we will dispose of this appeal on its merit since we believe her arguments lack merit. The arguments advanced herein are similar to those presented in Polk v. Commonwealth, Ky. App., 622 S.W.2d 233 (1981). In Polk, the appellant claimed his probation was revoked because of his inability rather than his refusal to pay court ordered restitution. Polk argued that it was unconstitutional to imprison someone solely because of nonpayment of fines. The Court in Polk rejected his argument and held that his failure to make payments resulted from his refusal, not his inability, to pay. The Court went on to state:

However, in the case at bar, the appellant made a firm commitment as a condition to his probation that a certain sum would be paid rather than his going to prison. This is a different situation from a fine imposed by a court. It was the understanding of all parties concerned that if the conditions of probation were not met, the probation would be revoked.

Polk, 622 S.W.2d at 225. Similarly, Thomas made a firm commitment not to use drugs in order to receive the benefits of the negotiated plea bargain for a probated sentence. Subsequently, as a result of her own actions, she violated the conditions of probation and now must suffer the consequences. The appellant does not claim the trial court denied her procedural due process of law under the United States and Kentucky Constitutions when it revoked her probation. Further, a review of the record shows clearly that she was afforded the

minimum due process required during a probation revocation proceeding. See generally, Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed. 484 (1972); Gagrim v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973); and Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838 (1977). Thomas's argument is not with the legal proceeding itself but with the legislation making personal use of marijuana illegal. That is an issue she needs to address to the Kentucky General Assembly. Our review of the lower court's proceedings convinces us that Thomas violated her probation, that all due process requirements were followed, and that the trial court's decision to revoke her probation was based upon substantial evidence. As such, the judgment of the Warren Circuit Court's to revoke appellant's probation is affirmed.

ALL CONCUR.

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